

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

SOUTHERN DIVISION

<p>NATIVE AMERICAN COUNCIL OF TRIBES, BLAINE BRINGS PLENTY, and CLAYTON SHELDON CREEK,</p> <p>Plaintiffs,</p> <p>vs.</p> <p>DOUGLAS WEBER, Warden of the South Dakota State Penitentiary; and DENNIS KAEMINGK, Secretary of the Department of Corrections,</p> <p>Defendants.</p>	<p>4:09-CV-04182-KES</p> <p>ORDER AMENDING REMEDIAL ORDER</p>
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Plaintiffs, Native American Council of Tribes (NACT), Blaine Brings Plenty, and Clayton Creek, succeeded in a court trial against defendants, Douglas Weber and Dennis Kaemingk, showing that a complete ban of tobacco in Department of Correction (DOC) facilities violates the Religious Land Use and Institutionalized Persons Act (RLUIPA). *Native Am Council of Tribes v. Weber*, 897 F. Supp. 2d 828 (D.S.D. 2012). On January 25, 2013, this court entered a remedial order that, among other things, required the DOC to amend its tobacco policy in order to ensure that inmates participating in Native American ceremonies are given the opportunity to use tobacco during the ceremonies. Docket 196. Pending are several motions filed by Creek to amend or enforce the remedial order. Docket 234; Docket 245; Docket 246. On

September 17, 2015, the parties entered a stipulation to amend the remedial order. Based on the stipulation, the remedial order is amended as follows:

Amended paragraph 4 will now provide:

4. The mixtures used during ceremonies will be provided by volunteers who are cleared by the DOC.¹ The volunteers must be eligible for and receive a “pink tag” or some equivalent clearance level.² Volunteers who violate the tobacco policy may be refused admission to any DOC facility and may be subject to prosecution.

In addition, Native American inmates may purchase Bugler brand tobacco at their own expense through the group account from an approved vendor, namely Eastwold Smoke Shop in Sioux Falls. The tobacco can be purchased in whatever quantity the inmates choose. It must be sent by Eastwold Smoke Shop directly to a DOC facility as with any other property purchased by an inmate from an approved outside vendor. The terms for purchasing tobacco will be the same as for purchasing property from another outside vendor. Inmates and non-inmates may donate funds from their individual accounts to the group account to be designated for the specific purpose of purchasing tobacco and bags in which the mixture is stored. The inmates will be responsible for purchasing the bags in which the mixture is stored. The mixture will be stored in a secure location outside the secure perimeter of each facility. Designated DOC staff will be in charge of mixing tobacco and red willow bark as otherwise prescribed in this Order. A pink tag volunteer or outside spiritual leader may make advance arrangements to observe the mixing, which will be done by staff during normal working hours during the regular workweek. Prior to use, the mixture may be picked up for use in a ceremony by an approved firekeeper or, if no approved firekeeper is in place at the time of the

¹ The DOC can implement procedures for mandating and documenting the reimbursement of the volunteers by the inmates for those volunteers who seek reimbursement.

² “Pink-tags” are given to (1) individuals who enter an adult DOC institution more than once a month, have reviewed the DOC volunteer handbook, have completed the required information requested within the handbook, and have completed a minimum of thirty-two hours of core curriculum during pre-service training and a minimum of four hours of mandatory topics during annual in-service training; (2) staff members who have not completed “blue-tag” training; and (3) contract psychiatrists or other specialists. Docket 190-1 at 1-4.

ceremony or will be participating in the ceremony, a group pipe carrier or approved pink tag volunteer. No pink tag volunteer is required to participate in any part of supervising tobacco use. The amount of mixture that will be distributed for each ceremony will be predetermined as follows: (1) one cup per pipe ceremony other than in connection with a Pow Wow; (2) one cup per Native American Church service; (3) two cups for making tobacco ties; and (4) two cups for each pipe ceremony in connection with a Pow Wow.

Amended paragraph 5 will now provide:

5. Unless the tobacco mixture is purchased by inmates as described in paragraph 4, mixtures provided by the approved volunteers must be brought into the facility in a sealed, clear plastic bag that is subject to search and marked for identification. Mixtures must be premixed to comply with the 1 percent tobacco by volume requirement.

All other paragraphs in the remedial order remain the same. Accordingly, it is

ORDERED that the stipulation to amend the remedial order (Docket 247) is granted.

IT IS FURTHER ORDERED that the motion to amend/correct the remedial order (Docket 234) is denied as moot.

IT IS FURTHER ORDERED that the motion to amend/correct the remedial order (Docket 245) is denied as moot.

IT IS FURTHER ORDERED that the motion to enforce the remedial order (Docket 246) is denied as moot.

Dated September 23, 2015.

BY THE COURT:

/s/ *Karen E. Schreier*

KAREN E. SCHREIER
UNITED STATES DISTRICT JUDGE